

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D725/2004

CATCHWORDS

Discrete contract for specific works – separate policy of warranty insurance for such specific works – completion date – expiry date of insurance policy
[2005] VCAT 1300

FIRST APPLICANT	Colin John Morley
SECOND APPLICANT	Ruth Morley
FIRST RESPONDENT	Andrew May
SECOND RESPONDENT	Superior Reblocking & Underpinning Pty Ltd
THIRD RESPONDENT	Vero Insurance Limited
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Preliminary Hearing – In Chambers
WRITTEN SUBMISSIONS RECEIVED	From the Applicants – 25 May 2005 and 20 June 2005 From the 3 rd Respondent – 3 June 2005
DATE OF ORDER	7 July 2005

ORDER

1. The answer to the preliminary question is that the insurance policy in respect of the works carried out by the Second Respondent had expired as at the date on which the insurance claim was submitted by the Applicant.
2. **The proceeding is referred to a directions hearing before Deputy President Aird at 2.15 pm on 25 August 2005 at 55 King Street, Melbourne - allow half a day at which time any consequential orders arising from this decision will be made, together with directions for the further conduct of the proceeding.**
3. Costs reserved – liberty to apply. Any application for costs of this preliminary hearing shall be heard at the directions hearing on 25 August 2005.

DEPUTY PRESIDENT C AIRD

APPEARANCES

For the Applicants	Mr M Bromby, Solicitor
For the First Respondent	No appearance
For the Second Respondent	No appearance
For the Third Respondent	Ms R Saunders, Solicitor

REASONS

1. On 3 May 2005, at the request of the Applicant ('the owners') and the Third Respondent ('the insurer'), I set aside the following question for determination as a preliminary issue 'on the papers':

Whether the insurance policy in respect to the works carried out by the Second Respondent had expired as at the date on which the insurance claim was submitted by the Applicants.

2. Directions were made for the conduct of the preliminary hearing 'on the papers' in substantially the form of consent orders submitted by the parties which included the filing and service of an Agreed Statement of Facts. Where the parties were unable to agree as to an Agreed Statement of Facts, Affidavits were to be filed and served on behalf of each of the parties. Written submissions were subsequently filed. Agreed Statements of Facts or Affidavits were not filed and the matter listed for a compliance hearing. Prior to the compliance hearing the parties wrote to the principal registrar advising:

...While not agreeing to an Agreed Statement of Facts, the parties are nevertheless of the opinion that the facts are adequately set out in the Submissions that have been filed on their behalf and there is no material difference of opinion concerning them.

Consequently, the parties are content for the preliminary hearing to proceed without affidavit evidence and on the basis of the submissions...

3. This is a disappointing response where the original directions were made in accordance with proposed consent orders of the parties. However, as the parties have requested the matter be determined without the filing of additional material I will do so.

Chronology

4. 29 May 1997 The previous owners made application for building approval as 'owner builders' for the construction of 'footings, carport/ pergola, fence, restumping, verandah and part demolition'.
- 6 June 1997 The insurer issued certificate of insurance for works to be carried out by the Second Respondent (the restumper).

8 June 1997	The building surveyor (who is not a party to this proceeding) issued a building permit to the previous owners as 'owner/builder'.
8 June 1997	The building surveyor inspected the restumping works carried out by the restumper.
17 June 1997	The date the insurer alleges the carried out by the Second Respondent were completed being the date of completion as recorded on the undated Certificate of Guarantee issued by the restumper.
June 1997	Unspecified date– the previous owners applied for a further building approval for the 'remainder of the works' with a stated value of \$70,000 naming the First Respondent, Andrew May, as the builder ('the builder').
30 June 1997	Second permit issued for works to be carried out by Andrew May Building Services.
30 June 1997	The insurer issued a certificate of insurance for the works to be carried out by the builder.
25 May 1998	Final inspection carried out by the building surveyor.
28 May 1998	The building surveyor issued a certificate of final inspection to the previous owners covering all of the owner/builder works (the subject of the first building permit issued on 8 June 1997).
20 June 1998	The owners purchased the property from the previous owners – no 'owner-builder' policy of insurance was provided to the owners with the contract of sale.
17 December 2003	The date the insurer alleges the period of insurance expired.
12 July 2004	The owners submitted two claim forms to the insurer in relation to the works carried out by the restumper and the builder respectively.
1 October 2004	The insurer denied the owners' claim in respect of the works carried out by the restumper on the grounds that the relevant policy of insurance had expired before the claim was made.

Date of completion of the works

5. The primary issue to be determined is the date of completion of the works. Is it 17 June 1997 as set out in the guarantee issued by the restumper or is it 28 May 1998 – the date of the Certificate of Final Inspection issued by the building surveyor?
6. The application for building permit lodged by the previous owners on 29 May 1997 records the builder as ‘owner-builder’. The building permit dated 8 June 1997 was issued to the previous owners as ‘Owner/Builder’ and is for the ‘*construction of additions and alterations, carport, verandah and new front fence to an existing dwelling*’ and the stage of works permitted noted as “*carport/pergola verandah, fence, restumping, exist dwelling, part demolition and footings only.*”
7. The Inspection Record completed by the Building Surveyors shows the stump holes were inspected on 8 and 12 June 1997 respectively. The other two recorded inspections were for the frame – on 11 July 1997 and the final inspection on 8 May 1009. Both permit numbers are included – the primary reference being to permit number 1283-0970421-1 - the permit issued on 8 June 1997 - with the numbers 456-2 noted above that number which I take to refer to the second permit issued on 30 June 1997 – permit number 1283-970456-2. The second permit was issued in respect of an Application for Building Permit on an unspecified date in June 1997 which records Andrew May as the builder and describes the nature of the building work as ‘alterations to an existing building’. The Certificate of Final Inspection issued on 28 May 1998 refers to both permits.
8. The owners rely on the definition of ‘completion date’ as set out in the relevant insurance policy which provides that ‘completion date’ is as defined in the Ministerial Order. The relevant Ministerial Order provides that ‘completion date’:

...shall have the same meaning as ... defined in section 137B(7) of the Building Act 1993. However, where the completion date cannot be determined under this definition it shall be the latest date that the builder

attended the relevant building site for the purpose of completing or inspecting works or handing over possession to the building owner.

9. Section 137B(7) of the *Building Act* 1993 provides:

(7) In this section—

"completion date" means—

- (a) the date of issue of the occupancy permit in respect of the building (whether or not the occupancy permit is subsequently cancelled or varied); or
- (b) if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work for the construction of the building;

10. Therefore 'completion' is defined in s137B as the date on which the Certificate of Occupancy was issued, or in the absence of a Certificate of Occupancy, the date on which the builder was last on site. I am satisfied that a Certificate of Occupancy was not issued for the restumper's works, if at all, and am of the view that the completion date must properly be construed as the date on which the restumper was last on site – at the very latest on 17 June 1997. Its works should not, and must not, be confused with the other works carried out by the previous owners under the first permit and major works carried out by the builder under the second permit. The restumping works were carried out under a discrete contract with a separate specific policy of warranty insurance.

11. I agree with the submissions on behalf of the owners that 'the very reason for the enactment of section 137B is to avoid ambiguous circumstancesfrom arising', and further that it would be unreasonable and unworkable to expect every contractor to issue a document specifying a completion date. Whilst it may be the intention of s137B to clarify the date of completion, any confusion or ambiguity here arises from the Inspection Record noting the inspections carried out in respect of both permits. I accept that s137B and the Ministerial Order do not contemplate different dates of completion for various stages of works. However, I reiterate my earlier comments in relation to the works covered by the

relevant insurance policy referring to the restumping works to be carried out by the restumper under a discrete contract, and not to the works generally.

12. In my view the restumper and the insurer would be unreasonably disadvantaged if I were to determine that the date of final inspection was the completion date for its works. In the absence of any evidence to the contrary I am satisfied the restumping works were completed on or about 17 June 1997. This is supported by the Inspection Record which records the inspection for the stump holes on 8 and 12 June 1997. There is no record of any further inspection of the restumping works.

13. I therefore find the insurance policy in respect of the restumping works expired on or about 17 December 2003, time under the policy having begun to run on 17 June 1997.

DEPUTY PRESIDENT C AIRD